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CURRENT TOPICS.

The recent decision of the Supreme Court of Illinois in Nevin v. Pullman Palace Car Co., has been pretty generally announced with quite a flourish of trumpets, by the lay press, (and indeed, several law journals have fallen into the same error), as settling the disputed question as to whether sleeping car companies are common carriers and liable as such. We have not yet seen a full report of the decision, but judging from the headnote of Mr. Freeman, the Reporter of the court, and the newspaper accounts which we have seen, the court decides nothing of the kind; but simply that the business of running sleepers has become a social necessity, and that there is upon the company an obligation to furnish accommodations to those who desire them, simliar to that imposed upon common carriers, ferrymen and inn-keepers. The court is quoted as saying: "When, therefore, a passenger who, under the rules of the company, is entitled to a berth, for the usual fare, and to whom no personal objection attaches, enters the company's sleeping-car at the proper time for the purpose of procuring accommodations, and in an orderly and respectful manner applies for a berth, offering or tendering the customary price therefor, the company is bound to furnish it; provided it has a vacant one at its disposal. For a breach of any of these implied duties, the court holds the company clearly liable." This is a very different thing from imposing upon them the multitudinous and onerous obligations and liabilties of common carriers, proper. Thus it is more than doubtful whether any court would regard this decision as conflicting with the doctrine established in Pullman Palace Car Co. v. Smith, 73 Ill. 360; Diehl v. Woodruff, 10 Cent. L. J. 66, and Blum v. Southern Palace Car Co., 3 Cent. L. J. 591, that the sleeping car companies are not liable for baggage of passengers stolen or lost while in the car, either as common carriers or innkeepers, but simply for the use of reasonable care and diligence; that is, they are in no sense insurers, but simply bailees for hire. This view of the law is supported by reason as well as authority. There is no sort of analogy of circumstances by which these "flying nondescripts," as Judge Thompson calls them in his work on Carriers of Passengers, p. 531, can be regarded as inns. We know of no better summary for the reasons for regarding them as distinct, than that contained in the charge to the jury of Judge Brown, of the Western District of Tennessee, in the case of Blum v. Southern Pullman Palace Car Co., 3 Cent. L. J. 592. The substance of the reasons there stated is briefly: 1. The peculiar construction of sleeping cars is such as to render it almost impossible, even with the most careful watch, to prevent the occupants of berths from being plundered by occupants of adjoining sections. 2. The innkeeper is compensated for his extraordinary liability by a lien upon the goods of his guest for the price of entertainment. The sleeping car company has no such lien. 3. The innkeeper must receive every guest who applies for entertainment. The sleeping car company receives only first-class passengers traveling on that particular road, and it has not yet been decided that it is bound to receive those. [This, however, is the very point, and the only one, settled by Nevin v. Pullman Palace Car Co., so far as we have been able to learn. ED. CENT. L. J.] 4. The innkeeper is bound to furnish food as well as lodging, and receive and care for the goods of his guest, and his liability is unrestricted in amount. The sleeping-car furnishes no food, but a bed only, and receives no luggage or goods. 5. An inn is an imperative necessity to a traveller. The sleeping car is a luxury, and the traveller by rail is not obliged to avail himself of it. 6. The inn-keeper has absolute control over his premises and may exclude every one but his servants and guests. The sleeping car is obliged to admit the employees of the train to collect fares and control its movement. 7. The sleeping car cannot even protect its guests, for the conductor of the train has the right to put them off for non-payment of fare or violation of its rules and regulations.

Still less can the sleeping car company be considered a common carrier, for the actual contract of carriage is made with the railroad company.

ILLEGAL CONTRACTS.

An illegal contract is a contract that provides that anything shall be done which is distinctly prohibited by law, or morality, or public policy. All such contracts are void and can not be enforced either in law or in equity.[1] Courts will not lend their assistance to grant relief to the parties to an illegal contract; and where the parties have been equally at fault, they will be left where the courts find them.[2] If the contract is illegal where it is made, it is illegal everywhere else, and any defense that would have barred an action in the place of contract, is a good defense wherever the contract is brought to be enforced.[3] Nor does it matter whether the contract be a simple one or a contract under seal.[4] And if the illegality does not appear on the face of the contract, it may be shown by parol.[5] However, the presumption always is that everything has been legally done, and if the opposite be alleged, it must be shown.[6]

Formerly there was a distinction between *mala prohibita* and *mala in se*, but this distinction no longer exists,[7] and the rule now seems to be, that no agreement to do an act forbidden by statute, or to omit doing one that the statute enjoins, is binding.[8] However, the decisions on this point seem to be by no means uniform. Thus in Harris v. Russell,[9] Swayne, J., said: "A statute containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without the prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. If there be nothing in the statute from which it may be inferred that the legislature did not intend to make a contract in contravention of it, void, the contract is wholly void and can not be enforced.[10] It has been held that a contract in contravention of the revenue laws is void,[11] but if the statute is passed for the purpose of raising a revenue by making it necessary for persons dealing in specified goods to take out a license under a penalty for neglecting so to do, there is no intending to prohibit a contract for the sale of such goods, and such a contract is binding, although the law has not been complied with.[12] Yet, if the statute was intended to protect the public as well as to raise a revenue, the penalty amounts to a prohibition, and the contract is void.[13]

The question sometimes arises as to the effect of a statute prohibiting an act upon a contract in regard to that act. There seems to be no doubt that when a statute strictly forbids an act, any contract in contravention of that statute is void.[14] And this is true when the statute merely inflicts a penalty.[15] Holt, C. J., in the above cited case, used the following language: "Every contract made for, or about, any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the defaulter; because a penalty implies a prohibition, though there are no prohibitory words in the statute."[16]

If the statute be for the prevention of fraud, and inflicts a penalty for failure to comply with its requirements, no action will lie for goods sold contrary to its provisions.[17] If, however, the object of the statute be to

[1] Shiffner v. Gordon, 12 East, 304; Belding v. Pitkin, 2 Caines, 149; Wheeler v. Russell, 17 Mass. 257; Smith v. Bromley, 2 Doug. 696; Binnington v. Wallis, 4 B. & Ald. 650; Barker v. Hoff, 7 Hun, 284.

[2] Cowan v. Milbourn, L. R. 2 Exchcq. 230; Lowell v. Boston, etc. R. Co., 23 Pick. 32.

[3] Kennedy v. Cochrane, 65 Me. 594.

[4] Merricks v. Trustee, 8 Gill. (Md.) 59; Spaulding v. Preston, 21 Vt. 9.

[5] Brown v. Brown, 34 Barb. 533.

[6] Bennet v. Clough, 1 B. & Ald. 463; Tucker v. Streetman, 38 Tex. 71; Craft v. Bent, 8 Kan. 328.

[7] Bank of United States v. Owens, 2 Pet. 538; Aubert v. Maze, 2 Bos. & Pul. 371.

[8] De Begins v. Armistead, 10 Bing. 110; Cope v. Rowlands, 2 M. & W. 153; Hooker v. De Palos, 28 Ohio St. 251.

[9] 12 Howard, 84.

[10] Harris v. Russell, *supra;* Vining v. Bricker, 6 Ohio St. 331.

[11] Ritchie v. Smith, 6 M. G. & S, 461.

[12] Johnson v. Hudson, 11 East, 180; Brown v. Duncan, 10 B. & C. 93; Wetherell v. Jones, 3 B. & Ald. 321; Dillon v. Allen, 46 Iowa, 299; Smith v. Mawhood, 14 M. & W. 463; Strong v. Darling, 9 Ohio, 201.

[13] Langton v. Hughes, 1 M. & S. 593; Cannan v. Bryce, 3 B. & Ald. 185; Gas-light & Coke Co. v. Turner, 5 New Cases, 677; Lightfoot v. Tenant, 1 B. & P. 551.

[14] Chitty on Contracts, 694; Wheeler v. Russell, 17 Mass. 258; Coombs v. Emery, 2 Shepley, 404; Springfield Bank v. Merrick, 14 Mass. 322; Sudenbender v. Charles, 4 Serg. & R. 159.

[15] Bartlett v. Vinor, Carth. 252.

[16] Bartlett v. Vinor, *supra.* See, also, De Begins v. Armistead, 10 Bing. 107; Cope v. Rowlands, 2 M. & W. 149.

[17] Law v. Hodson, 11 East, 300; Brown v. Duncan, *supra;* Wheeler v. Russell, *supra.*

protect one party against an undue advantage which the other party is supposed to possess, the contract will not be void, although the statute prohibits it.[18] A statute inflicting a penalty upon one of the parties to a contract, and which is silent as to the other, does not render the contract void as far as the second party is concerned. He will be entitled to have his contract enforced, although the first party would not.[19]

There are two classes of illegal contracts to which we desire especially to call the attention of our readers, and these are contracts of wager and Sunday contracts. A contract of wager has been defined to be a contract whereby two or more persons agree that a certain sum of money, or other thing, shall be paid or delivered to one of them on the happening or not happening of an uncertain event.[20] Wagers are not necessarily void at common law, and it is only when they are contrary to public policy and morality, when they tend to the injury of third persons, or when they are forbidden by statute, that they are void.[21] In this country there is a strong tendency against such contracts, and they are generally declared invalid.[22]

In Amory v. Gilman,[23] Parker, J., expresses his views on the subject of wagers in the following forcible language: "It would seem a disgraceful occupation of the courts of any country to sit in judgment between two gamblers, in order to determine which was the best calculator of chances, or which had the most cunning of the two. There could be but one step of degradation lower than this, which is that the judges should be stakeholders of the parties." Any wager upon the result of a public election is void, on the ground that it is contrary to public policy, and no action will lie by the winner to recover the bet.[24]

In Allen v. Hearn,[25] Lord Mansfield, in speaking of the effect of this class of wagers on the betters, said: "It is laying them under a pecuniary influence; it is making each of them in the nature of a candidate. If this is allowed, every other wager may be allowed. What is so easy, where a bribe is intended, as to lay a wager? it is a color for bribery and is therefore void." But the bet on the presidential election in another State, made after the vote was cast, is not against public policy, and has been held valid.[26] In this case, Canton, C. J., in delivering the opinion of the court, made use of the following language: "In the case of Morgan v. Pettit,[27] it was decided that a bet made between citizens of this State upon the result in another State, of a presidential election, then pending, was not forbidden by our statute, and was not void at common law as being against public policy. In this case there is much less objection as contravening public policy, for the bet was not made till several days after the election in New York, and after the vote must have been canvassed, although before the result was known here. Such a contract the parties had an undoubted right to make by the common law, and it is not forbidden by our statute." However, in other cases, it has been held that it was immaterial whether the bet was made before or after the election, as it was invalid in either case.[28] Any wager that has the tendency to wound the feelings or interests of individuals are void, and there can be no recovery on them.[29] Thus a bet upon the sex of a person,[30] or upon the age of a lady, or whether she had a mole on her face, is void.[31]

In Pennsylvania it has been held that any wager in regard to the age, height, weight, wealth, circumstances or situation of any person, is illegal.[32] A wager on the conviction

18 Scotten v. State, 51 Ind. 52.
19 Watrous v. Blair, 32 Ia. 58.
20 2 Bouv. Dict. 647, 648.
21 Good v. Elliott, 3 T. R. 693; Moon v. Durden, 2 Exch. 23; Haskett v. Wootan, 1 Nott. & M. 180; Ball v. Gilbert, 12 Met. 397; Campbell v. Richardson, 10 Johns. 406; Morgan v. Pettit, 3 Scam. 529; Kirkland v. Brown, 8 Tex. 105; Jones v. Randall, Cowper, 37.
22 Wheeler v. Spencer, 15 Conn. 27; West v. Holmes, 26 Vt. 530; Winchester v. Nutter, 52 N. H. 507; Rice v. Gist, 1 Strobh. 82; Collamer v. Day, 2 Vt. 144; Edgell v. McLaughlin, 6 Whart. 176.
23 2 Mass. 6.
24 Wheeler v. Spencer, 15 Conn. 27; Thompson v. Cronise, 16 Ohio, 54; Wroth v. Johnson, 4 Har. & M. 284; Bunn v. Kiker, 4 Johns. 426; Murdock v. Kilbourn, 6 Wis. 468; Worthington v. Block, 13 Ind. 344; Duncan v. Cox, 6 Blackf. 270; Hickerson v. Benson, 8 Mo. 8; Ruckman v. Pitcher, 1 Comst. 392.
25 1 T. R. 56, 59, 60.
26 Smith v. Smith, 21 Ill. 244.
27 3 Scam. 529.
28 Ball v. Gilbert, 12 Met. 397; McKee v. Manice, 11 Cush. 357; Murdock v. Kilbourn, 7 Wis. 468; McCullum v. Gourlay, 8 Johns. 147.
29 Hartley v. Rice, 10 East, 22.
30 Dacosta v. Jones, 1 Cowp. 729.
31 Good v. Elliott, 3 T. R. 693.
32 Phillips v. Ives, 1 Rawle. 36, 42. See, also, Eltham v. Kingman, 1 B. & Ald. 684; Gilbert v. Sykes, 16 East, 150; 2 Pars. on Contracts, sec. 756.

or acquittal of a prisoner on trial is illegal, as being against public policy.[33] So, also, is a wager on a question of abstract law or judicial practice, not arising out of circumstances really existing, in which the parties have a legal interest;[34] and a wager respecting the amount of any branch of the public revenue;[35] and where the tendency of the wager is to induce a public officer to violate his duty.[36]

"Option contracts" are regarded as wagers, and are generally declared void;[37] but a contract for the purchase of grain, giving the seller until the last day of the month, at his option, to deliver it, is not illegal when the purchaser contracted in good faith.[38]

It has been held that a contract of wager valid in the State where it is made, is valid everywhere;[39] but this doctrine is somewhat modified by a decision in Tarleton v. Baker.[40] The money deposited with the stakeholder on an illegal wager may be recovered from him even after the event has taken place, and that adversely to the depositor,[41] but the stakeholder must be notified not to pay it.[42] And it has been held in Massachusetts that if the winner received the money from the stakeholder after he had been forbidden to receive it and the stakeholder to pay it, he is liable in an action for money had and received.[43]

Another class of wagers that has received considerable attention from the courts is wager policies, which are defined to be policies made when the insured has no insurable interest.[44] Such contracts were valid at common law, and were just as binding upon the insurer as a policy upon interest.[45] But in this country and in England they are now prohibited by statute, or under decisions.[46] And the contract of insurance is now everywhere in this country construed as an agreement to indemnify which becomes inoperative when the insured ceases to have any interest which can be injured by perils covered by the policy.[47] Just what an insurable interest is, is a question that has been much discussed, but not satisfactorily answered. However, the stringency of the earlier decisions is being rapidly released, and now an insurable interest may be anything from a substantial, vested pecuniary interest to any act, event or property that can be be said with a reasonable degree of probability to have a bearing upon the condition of the insured.[48] And also the tendency of American decisions on the subject of life insurance is to allow any well-founded expectation of, or claims to, any advantage to be derived from the continuance of a life to support an insurance on that life, although there be no claim upon the person whose life is insured that can be recognized in law or equity.[49]

The other class of illegal contracts which we wish to discuss briefly are Sunday contracts. These contracts are regulated entirely by statutes, as by the common law there was no distinction made between those made on Sunday and those made on any other day.[50] Any contract made in violation of

[33] Evans v. Jones, 5 M. & W. 77.

[34] Henkin v. Guerss, 12 East, 247; s. c., 2 Camp. (N. P.) 408.

[35] Atherfold v. Beard, 2 T. R. 610.

[36] Jones v. Randall, Cowp. 39, 40.

[37] Pickering v. Cease, 79 Ill. 328; Lyon v. Culbertson, 83 Ill. 33; Grizewood v. Blane, 73 Eng. C. L. 525; Rourke v. Short, 34 Eng. L. & Eq. 219; Cassard v. Hinman, 1 Bos. 207; Matter of Chandler, 13 Am. L. Reg. (N. S.) 310; Bigelow v. Benedict, 70 N. Y. 202; Everingham v. Meighan, 15 Cent. L. J. 332; Barnard v. Backhaus, 52 Wis. 593; s. c., 9 N. W. Rep. 595; 11 Cent. L. J. 56.

[38] Pixley v. Boynton, 79 Ill. 351; Rumsey v. Berry, 65 Me. 570; Gregory v. Wendell, 39 Mich. 337; Kirkpatrick v. Bonsall, 72 Pa. St. 155.

[39] Thomas v. Davis, 7 B. Mon. 227.

[40] 18 Vt., 9.

[41] Wheeler v. Spencer, *supra*.

[42] Cotton v. Thurland, 5 T. R. 405; Hastelow v. Jackson, 8 B. & C. 221; Garrison v. McGregor, 51 Ill. 473; Adkins v. Fleming, 29 Iowa, 122; Wilkinson v. Tousley, 16 Minn. 299; Jeffrey v. Ficklin, 3 Pike, 227; Perkins v. Eaton, 3 N. H. 152.

[43] Love v. Harvey, 114 Mass. 80. See also Whitwell v. Carter, 4 Mich. 328.

[44] 2 Bouv. Dict., 647.

[45] St. John v. American Mut. Life Ins. Co., 2 Duer, 419; Buchanan v. Ocean Ins. Co., 6 Cow. 318; Clendenning v. Church, 3 Caines, 141; Juhel v. Church, 2 John. Cas. 333; 1 Duer on Ins. 94; 1 Phillips on Ins., 34; Patterson v. Powell, 9 Bing. 620; Cousins v. Nantes, 3 Taun. 512; Nantes v. Thompson, 2 East. 385; Bunn v. Kiker, 4 John. 426. But *contra*, see Park on Ins., 326; 1 Burrow, 492.

[46] Amory v. Gilman, 2 Mass. 1; Pritchett v. Ins. Co. of N. A., 3 Yeates, 464; 1 Duer on Ins., 95; Mutual Benefit Association of Michigan v. Hoyt, 46 Mich. 473; May on Ins., sec. 75.

[47] Murdock v. Chenango Ins. Co., 2 Coms., 210; Howe v. Mutual Ins. Co., 1 Sanf. 137; Eagle Ins. Co. v. Lafayette, 9 Ind. 443; Gilbert v. North American Ins. Co., 23 Wend. 43.

[48] May on Ins., sec. 76; Fann v. New Orleans Ins. Co., 53 Ga. 578; Hidden v. Slater Ins. Co., 2 Cliff. 266; Columbian Ins. Co. v. Lawrence, 2 Pet. 25.

[49] Bliss on Life Ins., 27; Hoyt v. New York Life Ins. Co., 3 Bosw. 440.

[50] Rex v. Brotherton, Stra. 702; Waite v. The Hundred of Stoke, Cro. Jac. 496; Drury v. Defontaine, 1

the statutes prohibiting the acts on which it is based, being performed on Sunday is absolutely void.[51] A bond or note made and delivered on Sunday can not be enforced.[52] But a promissory note in the hands of a *bona fide* holder, bearing date of a secular day, is valid.[53] In Pattee v. Grielly,[54] it was held that an action could not be maintained on a bond which was executed neither from necessity or charity on the Lord's day, and this seems to be the rule generally.[55] But in Kentucky the question is in doubt.[56] When a statute forbids the carrying on of one's ordinary occupation on the Lord's day, a contract made outside of his ordinary business is valid.[57]

Mansfield, C. J., in Drury v. Defontaine,[58] expressed his view on this point in the following words: "We can not discover that the law has gone so far as to say that every contract made on a Sunday shall be void, although under these penal statutes, if any man in his ordinary calling should make a contract on Sunday that contract would be void."

It has been held that a contract that is void because made on Sunday can not be ratified or confirmed;[59] but in some States the opposite doctrine seems to prevail.[60]

In Day v. McAllister,[61] Hoar, J., thus delivers the opinion of the court on the subject of ratification: "The statute which prohibits a Sunday contract was not designed merely for the protection of the defendant—giving him a personal privilege which he might waive, but rested upon grounds of broad public policy. The defendant could not ratify the illegal contract, because its want of validity did not depend in any degree upon his choice. The law annulled it, and there was no subject of ratification." But in King v. Fleming,[62] the court seemed to conflict with the decision in the above cited case. It was there held, that, "Although such contracts be entirely closed up on Sunday, yet if ratified by the parties on a subsequent day, they are valid." An action will not lie to recover damages arising from immoderate driving of a horse during a pleasure drive on the Lord's day, for which he was hired;[63] but if the injury occurred after the contract had ended, damages may be recovered for wilfully or negligently injuring him.[64]

A town is not liable for injuries to a person traveling, neither from necessity nor charity, on the Lord's day, although the injuries resulted from a defect in the highway, which the town was bound to keep in repair;[65] but if the injury took place after the legal expiration of that day, the fact that the horse was let on Sunday is no defense against an action to recover damages from the town for defective highways.[66]

The question has been raised as to the legality of a marriage consummated on Sunday.[67] The tendency to regard marriages as a mere civil contract would seem to make it subject to the same rules as any other contract. However, the custom of Sunday marriages has become so well established, and the effect of declaring them void would be so disastrous that any court would be very reluctant to make a mere abstract principle of law a ground for such an innovation.

In re Ganweve's estate,[68] the case was decided on the assumption that a marriage con-

Taun. 135; Story v. Elliott, 8 Cow. 27; Fox v. Mensch, 3 Watts & Serg. 444; Horacek v. Keebler, 5 Neb. 355.

[51] Allen v. Gardiner, 7 R. I. 22; Hazard v. Day, 14 Allen, 487; Tucker v. West, 29 Ark. 386.

[52] Day v. McAllister, 15 Gray, 433; Allen v. Deming, 14 N. H. 133; Fowle v. Larrabee, 26 Me. 464; Lyon v. Strong, 6 Vt. 219.

[53] Cransor v. Groos, 107 Mass. 439; Saltmarsh v. Tuthill, 13 Ala. 390; State Capital Bank v. Thompson, 42 N. H. 369.

[54] 13 Metc., 284.

[55] Wright v. Geer, 1 Root, 474; Northrup v. Foot, 14 Wend. 248; Morgan v. Richards, 1 Browne, 171; Shippey v. Eastwood, 9 Ala. 198; Adams v. Hamel, 2 Doug. 73.

[56] Ray v. Catleet, 12 B. Mon. 532.

[57] Bloom v. Richards, 2 Ohio St. 387; Rex v. Whitmarsh, 7 B. & C. 596. Peate v. Dickens, 5 Tyr. (S. C.) 116; 1 Cr. M. & R., 422; 3 Dowl., P. C. 171.

[58] 1 Taun. 131. See also Bloxsome v. Williams, 3 B. & C. 232.

[59] Day v. McAllister, 15 Gray, 433; Bradley v. Rea, 14 Allen, 20; s. c., 103 Mass. 188; 4 Am. Rep. 534; Pope v. Linn, 50 Me. 83; Boutell v. Melendy, 19 N. H. 196.

[60] Blood v. Bates, 31 Vt. 147; Sumner v. Jones, 24 Vt. 317; King v. Fleming, 72 Ill. 21; Harrison v. Colton, 31 Iowa, 16.

[61] 15 Gray, 433.

[62] 72 Ill. 20, citing Adams v. Gay, 19 Vt. 358; Commonwealth v. Kennedy, 2 Pa. St. 448; Clough v. Davis, 9 N. H. 500; Hilton v. Houghton, 35 Me. 143; Lovejoy v. Whipple, 18 Vt. 279; Smith v. Case, 2 Oreg. 190; Perkins v. Jones, 26 Ind. 499.

[63] Parker v. Latner, 60 Me. 528; Way v. Foster, 1 Allen, 408.

[64] Nodine v. Doherty, 46 Barb. 59; Morton v. Gloster, 46 Me. 520.

[65] Parker v. Latner, *supra*; Bosworth v. Swansey, 10 Metc. 363; Hinckley v. Penobscot, 42 Me. 90.

[66] Bryant v. Biddeford, 39 Me. 193.

[67] 2 Pars. Cont., 761.

[68] 14 Pa. St. 417.

summated on Sunday is valid, but the court was equally divided as to the effect of a marriage settlement made at the same time.

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A RATIONALE OF THE LAW OF COSTS.

Upon a hasty or superficial examination, the subject of costs would seem quite simple and its principles too well settled to admit a discussion; but a more careful inquiry soon discloses that it is really of a very complicated nature, and contains the germs of much controversy. Investigated from a scientific or theoretical standpoint, the, question "Who ought to pay the costs?" admits of a diversity of opinions. Some have contended that the costs of judicial enquiry should be borne alone by the State, because it is the fault of the State that there is sufficient uncertainty in the law to admit of litigation. And when it is objected that the controversy to be decided is, frequently, one arising upon facts, not law, the ready response is: If a conceded right is invoked, the State is bound to furnish the means of enforcing or protecting it. Those who support this view appeal to Ethics, and insist that it would be impossible, under any imaginable system of procedure, to so order things that "the law's delay" would affect rich and poor alike; and that thus the latter might often become the prey of a dishonest adversary, from sheer want of funds to protect his rights. On the other hand, it is urged that human nature, is not so solicitous to settle a disputed transaction, or legal ambiguity, on grounds of truth and justice, as to obtain an unfair or fraudulent advantage over an opponent; and that the imposition of a liability for costs upon a losing party deters the institution or defense of actions upon wrongful claims, and encourages the amicable settlement of legal controversies.[1]

Under the two systems of jurisprudence which have the most extensive authority amongst civilized nations, the Roman and the English, costs where not awarded at first, to either party in any event. It is true, the laws of Rome required the author of a groundless action to reimburse his adversary for al losses and expenses he might incur in the defense of his legal rights;[2] but this rule was not based on any acknowledged right in the defendant to be made whole, but rather upon the ground that the abuse of a privilege of citizenship was, *per se*, a violation of the law, punishable, not alone by the imposition of costs, but also by other and far more severe penalties, among which was loss of status as a Roman citizen.[3] There seems no reason for supposing that this particular penality was visited on unsuccessful defendants; and, though other punishments were imposed on defendants, it does not appear that costs were ever, under the Roman law, awarded to the plaintiff in any event. When the civil law arose from the ruins of Roman jurisprudence, the rule was developed: *Victus victori in expensis condemnatus est;* and, upon the rise of Chancery and Admiralty jurisdiction in England, this rule was applied to cases arising thereunder.

Chancery first obtained prominence under Edward I., but the office was not recognized as possessing any judical functions, until the reign of Edward III., when a statute was passed giving equity jurisdiction to the Chancellor. Admiralty was also established by a statute of Edward III.; and while there is a controversy whether this ancient branch of jurisprudence was, or was not, derived from the laws of Rome, it is certain that in Admiralty, as well as Chancery, the rules of the civil law prevailed over the common law. Thus the rule above referred to was adopted by these courts, in perference to the rule enforced in courts of common law.

At the common law, no costs were awarded to either party, *eo nomine*. If the plaintiff failed to recover, he was amerced *pro falso clamore*; but the amercement was given to the King. If he recovered, the defendant was in *misericordia* for his unjust detention of the plaintiff's debt, and was not, therefore, punished with the expenses of the litigation. Yet it appears that attempts were made, through the judgment *misericordia*, to reimburse the plaintiff, by taking his expenses into consideration in measuring his damages;[4]

[1] Amos, Science of Law, 317.

[2] Justinian, Lib. IV, T. XVI, c. 1.

[3] Galus, chs. III and IV.

[4] State v. Kinne. 41 N. H. 233; Hathaway v. Roach, 2 W. & M., 63.

but this custom never became a rule and was rarely and reluctantly followed.

But the fact that such an innovation on established precedents should be permitted in any case, was a recognition that the ancient rule was unjust, or, at least, defective. There is certainly a wide difference in principle between an amercement, penal in its nature, and a liablity to pay the costs of a successful opponent; and when it is seen that the new doctrine, while it did not award costs *eo nomine*, recognized, with considerable indefiniteness, however, a right to recover them, it is apparenst that a struggle had commenced which, sooner or later, must be settled by a legislative enactment. In fact, the growth of public opinion, accelerated by the hardships of litigation, culminated in the Statute of Gloucester;[5] the first English statute on the subject of costs.

This statute, seems to have been based upon the theory that the amercement in favor of the crown would be sufficient to deter the prosecution of wrongful demands, but that the damages awarded against a defendant *in misercordia*, were insufficient to discourage the interposition of wrongful defenses, or to reimburse the plaintiff for his expenses. Therefore, it was provided therein: "That defendant may recover, against the tenant, the costs of his writ purchased, together with the damages abovesaid, and this act shall hold in all cases, where the party is to recover damages; and every person from henceforth shall be compelled to render damages where the land is recovered against him upon his own intrusion, or his own act." By judical construction, the "costs of his writ" were extended to include all legal expenses of the action; and the statute was held to cover all cases, where damages were recovered after its passage, whether under laws in force at that time, or under subsequent legislation.

For two hundred and fifty years, there was no change of consequence[6] in the law, on the subject of costs. In the meantime, however, the authority and jurisdiction of the Court of Chancery, had been constantly augmented, in spite of the irrational hatred and opposition of English lawyers; and many of the maxims, it enforced were adopted into the laws of England by statutes. Thus, by a statute of Henry the Eighth,[7] it was provided as follows: "If the plaintiff, after the appearance of the defendant, be non-suited, or any verdict happens to pass by lawful trial against the plaintiff, the defendant shall have judgment to recover his costs, against the plaintiff, to be assessed and taxed at the discretion of the court, and shall have such process and execution for the recovery and paying his costs against the plaintiff, as the plaintiff should or might have had against the defendant, in case the judgment had been given for the plaintiff." But, while this enactment recognized the wisdom and justice of the rule of the civil law, "*victus victori, etc*," its provisions only applied to a few specified forms of action. And so slowly was the conservatism of English jurisprudence overcome, that the reigns of Edward, Mary and, Elizabeth were permited to pass before the law was made to conform to a recognized principle. By the statute finally enacted,[8] the provisions of the "good and profitable law" above set forth were extended to any action wherein the plaintiff might have costs if judgment were given for him.

From the fact that no costs were recoverable by either party, at common law the rule prevails both in England and the United States, that a party can in no case recover costs from his adversary, unless he can show some statute which gives him the right; a lingering remnant of the old barbaric dispensation, when philosophy, justice and common sense were sacrificed to formal and senseless precedents. Hence, statutes have been enacted in all the statutes of the Union, embodying the slowly developed English legislation on the subject; and it is under these statutes not from any generally recognized principle, that costs are taxed in favor of the prevailing party in actions at law. As these statutes simply enact the rule of the civil law, as it has been enforced for centuries by courts of Chancery and Admiralty, these ancient tribunals are still free to exercise their discretion, in all cases not expressly withdrawn from them by statute. Thus, the statutes of the United States being silent as to any general rule for taxing costs in favor of the prevailing party,

[5] 6 Edward I. c. .I

[6] The Statute of Marlbridge (52 Henry III. c. 6.), gave costs to a successful defendant, in a case relating to wardship in chivalry.

[7] 23 Henry VIII, c. 1.

[8] 4 James I, c. 3.

the Federal Courts of Chancery and Admiralty are still governed by the maxim *victus victori, etc.*, while the courts of law, under the same sovereignty, can only refer to the settled practice, and the implications arising from various acts of Congress, to adjudicate costs in favor of successful litigants.[9]

WARREN WATSON.

Kansas City, Mo.

Hathaway v. Roach, *supra*; Hunter v. Marlboro, 2 W. & M. 168, 208.

CONSTITUTIONAL LAW—EX POST FACTO LAWS—REMEDY AND PROCEDURE.

KRING v. STATE.

United States Supreme Court, April 2, 1883.

The plaintiff in error stands convicted of murder in the first degree by the judgment of the Supreme Court of the State of Missouri. He had been previously sentenced to twenty-five years' imprisonment on his plea of guilty of murder in the second degree, which sentence was, on his appeal, reversed and set aside. By the law of Missouri in force when the homicide was committed, this conviction was an acquittal of the higher crime of murder in the first degree, but that law was changed before the plea of guilty, so that a judgment on that plea set aside lawfully should not be held to be an acquittal of the higher crime. *Held*,

1. That as to this case the new law was an *ex post facto* law, within the meaning of sec. 10, art. 1, of the Constitution of the United States, and that plaintiff in error could not be again tried for murder in the first degree.

2. The history of the *ex post facto* clause of the Constitution reviewed in relation to its adoption as part of the Constitution, and its construction subsequently by the Federal and State courts.

3. The distinction between retrospective laws, which affect the remedy or the mode of procedure, and those which operate directly on the offense, held to be unsound where, in the latter case, they affect to his serious disadvantage any substantial right which the party charged with crime had under the law as it stood when the offense was committed.

4. Any law is an *ex post facto* law, within the meaning of the Constitution, passed after the commission of a crime charged against a defendant, which, in relation to that offense or its consequences, alters the situation of the party to his disadvantage; and no one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time.

In error to the Supreme Court of the State of Missouri.

Mr. Justice MILLER delivered the opinion of the court:

This is a writ of error to the Supreme Court of Missouri

The plaintiff in error was indicted in the criminal court of St. Louis for murder in the first degree, charged to have been committed January 4, 1875, to which he pleaded not guilty. He has been tried four times before a jury, and sentenced once on a plea of guilty of murder in the second degree. His case has been three times before the court of appeals of that State, and three times before the Supreme Court of the State. In the last instance, the Supreme Court affirmed the judgment of the criminal court, by which he was found guilty of murder in the first degree and sentenced to be hung, and it is to this judgment that the present writ of error is directed.

It is to be premised that the court of appeals is an intermediate appellate tribunal between the criminal court of St. Louis and the Supreme Court of the State, to which all appeals of this character are first taken.

At the trial, immediately preceding the last one in the court of original jurisdiction, the prisoner was permitted to plead guilty to murder in the second degree, which plea was accepted by the prosecuting attorney and the court, and on this plea he was sentenced to imprisonment in the penitentiary for twenty-five years. He took an appeal from this judgment, on the ground that he had an understanding with the prosecuting attorney that if he should plead as he did his sentence should not exceed ten years' imprisonment, and the Supreme Court reversed that judgment, and remanded the case to the St. Louis criminal court for further proceeding. In that court, when the case was again called, the defendant refused to withdraw his plea of guilty of murder in the second degree, and refused to renew his plea of not guilty, which had been withdrawn when he pleaded guilty to murder in the second degree, and the court, against his remonstrance, made an order setting aside his plea of guilty of murder in the second degree and ordered a general plea of not guilty to be entered. On this plea he was tried by a jury and found guilty and sentenced to death, as we have already said, which judgment was affirmed by the Supreme Court of the State. By refusing to plead not guilty to murder in the first degree and to withdraw his plea of guilty in the second degree, defendant raised the point that the proceedings under that plea, namely, its acceptance by the prosecuting attorney and the court, and his conviction and sentence under it was an acquittal of the charge of murder in the first degree, and that he could not be tried again for that offense. This point he insisted on in the circuit court, and relied on it for reversing the judgment in the court of appeals and in the Supreme Court. Both these latter tribunals, in the opinions delivered by them, and which are part of the record, conceded that such was the law of the State of Missouri at the time the homicide was committed. But they overruled the defense on the ground that, by sec. 23, of art. 2, of the Constitution of Missouri, which took effect November 30, 1875, that law was abrogated,

and for this reason defendant could be tried for murder in the first degree, notwithstanding his conviction and sentence for murder in the second degree. As this new constitution was adopted after the crime was committed for which Kring is indicted, and, as construed by the court of appeals and the Supreme Court, changes the law as it then stood, to the disadvantage of the defendant, the jurisdiction of this court is invoked on the ground that, as to this case, and as so construed, it is an *ex post facto* law, within the meaning of sec. 10, art. 1, of the Constitution of the United States.

That it may be clearly seen what the Supreme Court of Missouri decided on this subject, and what consideration they gave it, we extract here all that is said in their opinion about it: "There is nothing in the point," they say, "that after an accepted plea of guilty of murder in the second degree the defendant could not be put upon trial for murder in the first degree. We shall, on that proposition, accept what is said by the court of appeals in its opinion in this cause." What that court said on this subject is as follows: "The theory of counsel for defendant that a plea of guilty of murder in the second degree, regularly entered and received, precludes the State from afterwards prosecuting the defendant for murder in the first degree, is inconsistent with the ruling of the Supreme Court in State v. Kring, 71 Mo. 551, and in State v. Stephens, Ib. 535. The declarations of defendant that he would stand upon his plea already entered were all accompanied with a condition that the court should sentence him for a term not exceeding ten years, in accordance with an alleged agreement with the prosecuting attorney, which the court would not recognize. The prisoner did not stand upon his plea of guilty of murder in the second degree; he must, therefore, be taken to have withdrawn that plea, and, as he refused to plead, the court properly directed the plea of not guilty of murder in the first degree to be entered. Formerly it was held in Missouri (State v. Ross, 29 Mo. 32), that when a conviction is had of murder in the second degree on an indictment charging murder in the first degree, if this be set aside, the defendant can not again be tried for murder in the first degree. A change introduced by sec. 23, of art. 2, of the Constitution of 1875, has abrogated this rule. On the oral argument something was said by counsel for the defendant to the effect that under the old rule defendant could not be put on his trial for murder in the first degree, and that he could not be affected by the change of the constitutional provision, the crime having been committed whilst the old constitution was in force. There is, however, nothing in this; this change is a change not in crimes, but in criminal procedure, and such changes are not *ex post facto*. Gut v. State, 9 Wall. 35; Cummings v. Missouri, 4 Wall. 326."

We have here a distinct admission that by the law of Missouri, as it stood at the time of the homicide, in consequence of this conviction of the defendant of the crime of murder in the second degree, though that conviction be set aside, he could not be again tried for murder in the first degree. And that, but for the change in the Constitution of the State, such would be the law applicable to his case. When the attention of the court is called to the provision that if such effect is given to the change of the Constitution, it would, in this case, be liable to objections as an *ex post facto* law, the only answer is, there is nothing in it, as the change is simply in the matter of procedure. Whatever may be the essential nature of the change, it is one which, to the defendant, involves the difference between life and death, and the retroactive character of the change can not be denied.

It is to be observed that the force of the argument for acquittal does not stand upon defendant's plea, nor upon its acceptance by the State's attorney, nor the consent of the court; but it stands upon the judgment and sentence of the court by which he is convicted of murder in the second degree, and sentence pronounced according to the law of that guilt, which was by operation of the same law an acquittal of the other and higher crime of murder charged in the same indictment.

It is sufficient for this case that the Supreme Court of Missouri, in the opinion we are examining, says it was so, and cites as authority for it the case of State v. Ross, 29 Mo. 32, in the same court; but counsel for plaintiff in error cites to the same effect the cases of State v. Bull, 28 Mo. 429; State v. Smith, 53 Mo. 139.

Blackstone says (Commentaries, Book 4, side page 336): "The plea of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given, or, perhaps, will be (being suspended by benefit of clergy or other causes), is a good plea in bar to an indictment. And this depends upon the same principle as the former (that is, *autrefois acquit*), that no man ought to be twice brought in danger of his life for one and the same crime. Hereupon it has been held that a conviction of manslaughter, on an appeal or indictment, is a bar even in another appeal, and much more in an indictment for murder; for the fact prosecuted is the same in both, though the offenses differ in coloring and degree." See State v. Norvell, 2 Yerger (Tenn.), 31; 9 Yerger, 337.

This law, in force at the date of the homicide for which Kring is now under sentence of death, was changed by the State of Missouri between that time and his trial, so as to deprive him of its benefit, to which he would otherwise have been entitled, and we are called on to decide whether in this respect, and as applied by the court to this case, it is an *ex post facto* law within the meaning of the Constitution of the United States.

There is no question of the right of the State of Missouri, either by her fundamental law or by an ordinary act of legislation, to abolish this rule

and that it is a valid law as to all offenses committed after its enactment. The question here is, does it deprive the defendant of any right of defense which the law gave him when the act was committed, so that as to that offense it is *ex post facto*? The term necessarily implies a fact or act done, *after* which the law in question is passed. Whether it is *ex post facto* or not relates, in criminal cases, to which alone the phrase applies, to the time at which the offense charged was committed. If the law complained of was passed before the commission of the act with which the prisoner is charged, it can not, as to that offense, be an *ex post facto* law. If passed after the commission of the offense, it is as to that *ex post facto*, though whether of the class forbidden by the Constitution, may depend on other matters. But so far as this depends on the time of its enactment, it has reference solely to the date at which the offense was committed to which the new law is sought to be applied. No other time or transaction but this has been in any adjudged case held to govern its *ex post facto* character.

In the case before us, an argument is made, founded on a change in this rule. It is said the new law in Missouri is not *ex post facto*, because it was in force when the plea and judgment were entered of guilty of murder in the second degree; thus making its character as an *ex post facto* law to depend, not upon the date of its passage as regards the commission of the offense, but as regards the time of pleading guilty. That, as the new law was in force when the conviction on that plea was had, its effect as to future trials in that case must be governed by that law. But this is begging the whole question, for if it was as to the offense charged an *ex post facto* law, within the true meaning of that phrase, it was *not* in force and could not be applied to the case, and the effect of that plea and conviction must be decided as though no such change in the law had been made. Such, however, is not the ground on which the Supreme Court and the Court of Appeals placed their judgment. "There is nothing," say they, "in this. The change is a change not in crimes, but in criminal procedure, and such changes are not *ex post facto*." Before proceeding to examine this proposition, it will be well to get some clear perception of the purpose of the convention which framed the Constitution, in declaring that no State shall pass any *ex post facto* law. It was one of the objections most seriously urged against the new Constitution by those who opposed its ratification by the States, that it contained no formal Bill of Rights. Federalist, No. LXXXIV. And the State of Virginia accompanied her ratification by the recommendation of an amendment embodying such a bill. 3 Elliott's Debates, 661.

The feeling on this subject led to the adoption of the first ten amendments to that instrument at one time, shortly after the government was organized. These are all designed to operate as restraints on the general government, and most of them for the protection of private rights of persons and property. Notwithstanding this reproach, however, there are many provisions in the original instrument of this latter character, among which is the one now under consideration.

So much importance did the convention attach to it, that it is found twice in the Constitution, first as a restraint upon the power of the general government, and afterwards as a limitation upon the legislative power of the States. This latter is the first clause of section 10 of art. 1, and its connection with other language in the same section may serve to illustrate its meaning. "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility."

It will be observed that here are grouped contiguously a prohibition against three distinct classes of retrospective laws, namely, bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts. As the clause was first adopted, the words concerning contracts were not in it, because it was supposed that the phrase *ex post facto* law included laws concerning contracts as well as others. But it was ascertained before the completion of the instrument that this was a phrase which, in English jurisprudence, had acquired a signification limited to the criminal law, and the words "or any law impairing the obligation of contracts" were added to give security to rights resting in contracts. 2 Bancroft's History of the Constitution, 213.

Sir Thomas Tomlin, in that magazine of learning—the English edition of 1835 of his Law Dictionary—says: "*Ex post facto* is a term used in the law, signifying something done after, or arising from or to affect another thing that was committed before." "An *ex post facto* law is one which operates upon a subject not liable to it at the time the law was made."

The first case in which this court was called upon to construe this provision of the Constitution, was that of Calder v. Bull, 3 Dallas, 386, decided in 1798. The opinion of the court was delivered by Chase, J., and its main purpose was to decide that it had no application to acts concerning civil rights. The opinion, however, is important, as it discusses very fully the meaning of the provision in its application to criminal cases. It defines four distinct classes of laws embraced by the clause. "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates the crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than th

law required at the time of the commission of the offense in order to convict the offender." Again he says: "But I do not consider any law *ex post facto*, within the prohibition, that modifies the rigor of the law, but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction."

In the case before us the Constitution of Missouri so changes the rule of evidence, that what was conclusive evidence of innocence of the higher grade of murder when the crime was committed, namely, a judicial conviction for a lower grade of homicide, is not received as evidence at all, or if received, is given no weight in behalf of the offender. It also changes the punishment, for, whereas the law as it stood when the homicide was committed was that, when convicted of murder in the second degree, he could never be tried or punished by death for murder in the first degree, the new law enacts that he may be so punished, notwithstanding the former conviction.

But it is not to be supposed that the opinion in that case undertook to define, by way of exclusion, all the cases to which the constitutional provision would be applicable. Accordingly, in a subsequent case tried before Mr. Justice Washington, he said, in his charge to the jury, that "an *ex post facto* law is one which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage." United States v. Hall, 2 Washington C. C. O. 366.

He adds, by way of application to that case, which was for a violation of the embargo laws: "If the enforceing law applies to this case, there can be no doubt that, so far as it takes away or impairs the defense, which the law had provided the defendant at the time when the condition of this bond became forfeited, it is *ex post facto* and inoperative." This case was carried to the Supreme Court and the judgment affirmed. 6 Cranch, 171.

The new constitution of Missouri does take away what, by the law of the State when the crime was committed, was a good defence to the charge of murder in the first degree.

In the subsequent case of Cumming v. The State of Missouri, and *Ex parte* Garland, 4 Wall., 277, 333, this court held, that a law which excluded a minister of the gospel from the exercise of his clerical function, and a lawyer from practice in the courts unless each would take an oath that they had not engaged in or encouraged armed hostilities against the government of the United States, was an *ex post facto* law, because it punished, in a manner not before punished by law, offenses commited before its passage, and because it instituted a new rule of evidence in aid of conviction. Though this court was divided in that case, it was because the minority were of opinion that the act in question was not a crimes act, and that it inflicted no punishment, in the judicial sense, for any past crime, and they did not controvert the proposition that it was an *ex post facto* law, if it had that effect.

In these cases we have illustrations of the liberal construction which this court, and Mr. Justice Washington in the circuit court, have given to the words *ex post facto* law—a construction in manifest accord with the purpose of the constitutional convention to protect the individual rights of life and liberty against hostile retrospective legislation. Nearly all the States of the Union have similar provisions in their constitutions, and whether they have or not, they all recognize the obligatory force of this clause of the federal Constitution on their legislation. A reference to some decisions of those courts will show the same liberality of construction of the provision, many of them going much farther than is necessary to go in this case to show the error of the Missouri courts.

In the Supreme Court of Massachusetts, in the case of the case of The Commonwealth v. McDonough, 13 Allen, 581, it was held that a law passed after the commission of the offense of which defendant stood charged, which mitigated the punishment, as regarded the fine and the maximum of imprisonment that might be inflicted, was an *ex post facto* law as to that case, because the minimum of imprisonment was made three months, whereas before there was no minimum limit to the court's discretion. This slight variance in the law was held to make it *ex post facto* and void as to that case, though the effect of the decision was to leave no law by which the defendant could be punished, and he was discharged, though found guilty of the offense.

In the case of Mrs. Hartung v. The People, 22 N. Y., 95, after she had been convicted of murder and sentenced to death, and while her case was pending on appeal, the legislature of that State changed to law for the punishment of murder in general, so as to authorize the governor to postpone indefinitely the execution of the sentence of death, and to keep the party confined in the penitentiary at hard labor until he should order the full execution of the sentence or should pardon or commute it.

The court of appeals held that, while this later law repealed all existing punishments for murder, it was *ex post facto* as to Mrs. Hartiung's case, and could not be applied to it. and this was decided in face of the fact that it resulted in the discharge of a convicted murderess without any punishment at all.

Judge Denio, in delivering the opinion of the court, makes these excellent observations:

"It is highly probable that it was the intention of the legislature to extend favor rather than increased severity towards the convict and others in her situation; and it is quite likely that, had they been consulted, they would have preferred the application of this law to their cases, rather than that which existed when they committed the offenses of which they are convicted. But

the case can not be determined on such considerations. No one can be criminally punished in this country, except according to a law prescribed for his government before the supposed offense was committed, and which existed as a law at that time. It would be useless to speculate upon the question whether this would be so upon the reason of the thing, and according to the spirit of our legal institutions, because the rule exists in the form of an express written precept, the binding force of which no one disputes. No State shall pass any *ex post facto* law is the mandate of the Constitution of the United States."

This is reaffirmed by the same court in the cases of Shepherd v. People, 25 N. Y., 406; Green v. Shumway, 39 N. Y. 418; and *In re* Petty, 22 Kan., 477, the same thing is decided. In the case of State v. Keith, 63 North Carolina, the supreme court of that state held that a law repealing a statute of general amnesty for offenses arising out of the rebellion, was *ex post facto* and void, though both statutes were passed after the acts were committed with which defendant was charged.

In the case of State v. Sneed, 25 Texas Supplement 66, the court held that in a criminal case barred by the statute limitations, a subsequent statute which enlarged the time necessary to create a bar was, as to that case, an *ex post facto* law, and it could not be supposed to be intended to apply to it.

When, in answer to all this evidence of the tender regard for the rights of a person charged with crime under subsequent legislation affecting those rights, we are told that this very radical change in the law of Missouri to his disadvantage is not subject to the rule because it is a change, not in crimes, but in criminal procedure, we are led to inquire what that court meant by crimial procedure. The word procedure, as a law term, is not well understood, and is not found at all in Bouvier's Law Dictionary, the best work of the kind in this country. Fortunately a distinguished writer on Criminal Law in America has adopted it as the title to a work of two volumes—Bishop on Criminal Procedure. In his first chapter he undertakes to define what is meant by procedure. He says: "Sec. 2. The term procedure is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, Pleading, Evidence and Practice." And in defining Practice, in this sense, he says: "The word means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in;" and Evidence, he says, as part of procedure, "signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted."

If this be a just idea of what is intended by the word procedure as applied to a criminal case, it is obvious that a law which is one of procedure may be obnoxious as an *ex post facto* law, both by the decision in Calder v. Bull, 3 Dallas, 386, and in Cummings v. Missouri, 4 Wall. 277, for in the former case this court held, that "any law which alters the legal rules of evidence, and receives less or different testimony than the law requires at the time of the commission of the offense, in order to convict the offender," is an *ex post facto* law; and in the latter, one of the reasons why the law was held to be *ex post facto* was that it changed the rule of evidence under which the party was punished.

But it can not be sustained without destroying the value of the constitutional provision, that no law, however it may invade or modify the rights of a party charged with crime, is an *ex post facto* law within the constitutional provision, if it comes within either of these comprehensive branches of the law designated as Pleading, Practice and Evidence. Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed by State legislation after the offense committed, to the disadvantage of the prisoner, and not held to be *ex post facto* because it relates to procedure, as it does according to Mr. Bishop? And can any substantial right which the law gave the defendant at the time to which his guilt relates, be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it can not.

Some light may be thrown upon this branch of the argument by a recurrence to a few of the numerous decisions of the highest courts construing the associated phrase in the same sentence of the Constitution which forbids the States to pass any law impairing the obligation of contracts. It has been held that this prohibition also relates exclusively to laws passed after the contract is made, and its force has been often sought to be evaded by the argument that laws are not forbidden which affect only the remedy, if they do not change the nature of the contract or act directly upon it. The analogy between this argument and the one concerning laws of procedure in relation to the contiguous words of the Constitution, is obvious. But while it has been held that a change of remedy made after the contract may be valid, it is only so when there is substituted an adequate and sufficient remedy by which the contract may be enforced, or where such remedy existed and remained unaffected by the new law. Tennessee v. Sneed, 96 U. S. 69; Antoni v. Greenhow, present term. [See 16 Cent. L. J. 275.—ED. CENT. L. J.]

On this law it has been held that laws are void enacted after the date of the contract: 1. Which give the debtor a longer stay of execution after judgment. Blair v. Williams, 4 Littell (Ky.), 35; McKinney v. Carroll, 5 Monroe, 98. 2. Which require on a sale of his property under execution an appraisement, and a bid of two-thirds the value so ascertained. Bronson v. Kinzie, 1 How. 311; McCracken v. Hayward, 2 How. 608; 4 Lit-

tell, 35; Sprott v. Reid, 3 G. Greene, 489. 3. Which allow a period of redemption after such sale. Lapsley v. Brashear, 4 Littell, 58; 7 Monroe (Ky.), 54; Cargill v. Pierce, 1 Mich. 369; Robinson v. Howe, 13 Wis. 341. 4. Which exempt from sale under judgment for the debt a larger amount of the debtor's property than was exempt when the debt was contracted. Edwards v. Kearzey, 96 U. S. 59, and the cases there cited; Story's Commentary on the Constitution, sec. 1835.

There are numerous similar decisions showing that a change of the law which hindered or delayed the creditor in the collection of his debt, though it related to the remedy or mode of procedure by which that debt was to be collected, impaired the obligation of the contract within the meaning of the Constitution. Why are not the rights of life and liberty as sacred as the right of contract! Why should not the contiguous and associated words in the Constitution, relating to retroactive laws, on these two subjects, be governed by the same rule of construction? And why should a law, equally injurious to the rights of the party concerned, be void in one case and not in the other, under the same circumstances?

But it is said that at the time the prisoner pleaded guilty of the second degree of murder, and at the time he procured the reversal of the judgment of the criminal court on that plea, the new Constitution was in force, and he was bound to know the effect of the change in the law on his case. We do not controvert the principle that he was bound to know and take notice of the law. But as regards the effect of the plea and the judgment on it, the Constitution of Missouri made no change. It still remained the law of Missouri, as it is the law of every State in the Union, that so long as the judgment rendered on that plea remained in force, or after it had been executed, the defendant was liable to no further prosecution for any charge found in that indictment.

Such was the law when the crime was committed, such was the law when he pleaded guilty, such is the law now in Missouri and everywhere else. So that in pleading guilty under an agreementf or ten years' imprisonment, both he and the prosecuting attorney and the court ali knew that the result would be an acquittal of all other charges but that of murder in the second degree.

Did he waive or annul this acquittal by prosecuting his writ of error? Certainly not by that act, for if the judgment ot the lower court sentencing him to twenty-five years' imprisonment had been affirmed, no one will assert that he could still have been tried for murder in the first degree. Nor was there anything else done by him to waive this acquital. He refused to withdraw his plea of guilty. It was stricken out by order of the court against his protest. He refused then to plead not guilty, and the court in like manner, against his protest, ordered a general plea of not guilty to be filed. He refused to go to trial on that plea, and the court forced him to trial.

The case rests then upon the proposition that, having an erroneous sentence rendered against him on the plea accepted by the court, he could only take the steps which the law allowed him, to reverse that sentence at the hazard of subjecting himself to the punishment of death for another and a different offense of which he stood acquitted by the judgment of that court.

That he prosecuted his legal right to a review of that sentence with a halter around his neck, when, if he succeeded in reversing it, the same court could tighten it to strangulation, and if he failed, it did him no good. And this is precisely what has occurred. His reward for proving the sentence of the court of twenty-five years' imprisonment (not its judgment on his guilt) to be erroneous, is that he is now to be hanged instead of imprisoned in the penitentiary. No such result could follow a writ of error before, and as to this effect, the new Constitution is clearly *ex post facto*. The whole error, which results in such a remarkable conclusion, arises from holding the provision of the new Constitution applicable to this case, when the law is *ex post facto* and inapplicable to it.

If Kring or his counsel were bound to know the law when they prosecuted the writ of error, they are bound to know it as we have expounded it. If they knew that by the *words* of the new Constitution such a judgment of acquittal as he had when he undertook to reverse it, would be no longer an acquittal after it was reversed, they also knew that, being as to his case an *ex post facto* law, it could have no such effect on that judgment.

We are of opinion that any law passed after the commission of an offense which, in the language of Washington, in United States v. Hall, "in relation to that offense, or its consequences, alters the situation of a party to his disadvantage," is an *ex post facto* law, and in the language of Denio, in Hartung v. People, "No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time."

Tested by these *criteria*, the provision of the Constitution of Missouri which denies to plaintiff in error the benefit which the previous law gave him of acquittal of the charge of murder in the first degree, on conviction of murder in the second degree, is, as to his case, an *ex post facto* law, within the meaning of the Constitution of the United States, and for the error of the Supreme Court of Missouri, in holding otherwise, its judgment is reversed, and the case is remanded to it, with direction to reverse the judgment of the Criminal Court of St. Louis, and for such further proceedings as are not inconsistent with this opinion.

CRIMINAL LAW—MISSPELLED VERDICT.

WOOLRIDGE v. STATE.

Texas Court of Appeals, Galveston Term, 1883.

In a criminal case, a verdict reading: "We, the jury, find the defendant guilty of murder in the *fist* degree and assess his punishment at death," is null and void.

Appeal from Fayette county. WHITE, P. J., delivered the opinion of the court:

On the night of the 11th of August, 1882, Antone Roerich was assassinated at his home in Fayette county. Appellant and one Nathan Stevens were jointly indicted for the murder. On the 25th of November, appellant was alone placed upon trial, and the result was his conviction of murder in the first degree, with the penalty assessed at death. From this judgment of conviction he appeals to this court. Several supposed errors are complained of as grounds for a reversal of the judgment, the most important of which are: 1. That the court erred in overruling his application for a continuance. 2. Error in refusing to give in charge to the jury special instructions requested in behalf of defendant upon the law of circumstantial evidence and, 3. Nullity of the verdict rendered by the jury.

Under our statute now in force, the granting or refusal of an application for continuance is a matter confided to the sound discretion of the trial judge, and is no longer, as formerly, even on the first application, a matter of right. (C. C., Art. 569, sub. div. 6.) In revising the refusal of a continuance asked on account of absent witnesses, the evidence adduced at the trial is considered by this court for the purpose of determining whether the desired testimony was probably true, as well as whether it was material, if true, and the materiality of the evidence must also appear before we would feel authorized to declare that the court below had abused its discretion. (Dowdy v. State, 9 Tex., Ct. of App., 292.)

Of the four witnesses, on account of whose absence the continuance in this instance was sought, one (the witness Wheeler) was not a resident of the the county and diligence is not shown to procure his attendance; another (Josephine Wooldridge, wife or the defendant,) was sent for by the court, was present at the trial, but defendant declined and refused to place her upon the stand to testify to the facts which it was alleged could be proven by her. As far as this latter witness' testimony is concerned, defendant certainly has no just ground of complaint, since he had every opportunity to avail himself of it, and did not do so. It is no reason or excuse for his action to say that he would not consent to have her testify unless the other witnesses named in his motion were also produced. And if the statement in the motion for continuance be true, defendant could have proven all the facts, which he expected the absent witness to establish, by Josephine Wooldridge, for he says: "By the witness Josephine Wooldridge, defendant expects to prove all the facts above alleged (referring to the facts which he had just stated the other witness would prove), and, further, that she (the witness) is the wife of defendant, and that on the night of the alleged killing, she walked from their home to the church with defendant, and that defendant carried no gun with him; that she also walked home with defendant from church on the same night, and that he had no gun with him at all that night."

According to this statement, there was afterwards present in court a witness by whom defendant could actually have proven all the facts he wished, and expected to prove by the absent witnesses, and yet he declined to put this witness on the stand, and now asks a reversal of the case, because he was deprived of the testimony. But suppose he could have proven by Josephine Wooldridge what he alleges he could prove by these absent witnesses, the pertinent inquiry then would be, taken in connection with the testimony adduced, is the desired testimony probably true, even if the witness being present should swear as indicated? We are compelled to answer the question in the negative. It is stated in the application "that all three of the absent witnesses heard the report of the gun which is alleged to have killed said Roerich, and that at the time of the discharge of said gun, this defendant was present at St. Paul's Church, and engaged in conversation with said witnesses some 300 or 400 yards from the place of the shooting, and that therefore defendant could not have been the person who killed said Antone Roerich."

In the statement of facts it is shown that defendant was moderator of the church. He was looked for that night. A number persons were present. Some four or five of those who were present at the church testified as witnesses of the trial for defendant, and whilst they all state that they saw him at the church both before and after the shooting, not a single one swears that he was there when the fatal shots were heard, nor is the evidence of any one of them inconsistent with the theory that he could and did commit the deed. On the other hand, upon his defense of *alibi*, to our minds, though negative in character, the evidence of these witnesses appears to be strongly confirmatory of his guilt. Under all the circumstances shown by the evidence before us, it is neither credibly true, nor probably true, that he was present at the church and conversing with the absent witness when the deed was committed, and so believing we cannot say that the action of the court in overruling the motion for a new trial, so far as it rested upon this ground, was erroneous.

Nor did the court err in refusing to give the requested special instruction upon circumstantial evidence in charge to the jury. There could be no more positive and direct testimony than that of the murdered man's wife as to the identity of the

defendant, and the fact that he fired the fatal shots which deprived her husband of his life. This was the main fact, and the circumstantial evidence adduced was consistent with and only in corroboration of it. We come now to the consideration of the objections urged to the sufficiency and validity of the verdict. It is in these words, viz.: "We, the jury, find the defendant, Ben. Woldridge, guilty of murder in the *fist* degree and assess the punishment at death."

Instead of the word "first," the jury have used the word "fist," or in spelling the word "first," have omitted the letter "r." This is the error contended for, *e. g.*, that the jury have not found defendant guilty of murder in the first degree, and that consequently the judgment rendered was not warranted, nor is it supported by the verdict. Defendant presented the insufficiency of this verdict as one of the grounds of his motion for a new trial, which was overruled. A most serious question is here presented, and no case directly in point has been found in our own, or the decisions of other courts of the country. We must determine it by a fair and proper construction of our statutes relating to the subject matter by analogies drawn from well settled principles of the law. It is to be particularly noted that here we have no case of the mis-spelling of a word. The word used is "fist;" is properly spelled "fist," and is a word as well-defined and as well known to the English language as any other word in daily common use. It is further to be noted that this word "fist" is not, and can not, by any contortion of pronunciation be made to sound like the word "first," and consequently the well-recognized doctrine of *idem sonans* is not applicable, and must be eliminated from the discussion.

Now, what are the statutory and legal rules with regard to verdicts? A verdict is a declaration by a jury of their decision of the issues submitted to them in the case, and it must be in writing and concurred in by each member of the jury." C. C. P., art. 705. Three things are requisite: First, it must declare the issues. Second, it must be in writing. Third, it must be concurred in by all the jurymen. Again, "when the jury have agreed upon a verdict, they shall be brought into court by the proper officer, and if, when asked, they have agreed, the verdict shall be read aloud by the clerk, and if in proper form and no juror dissents therefrom, and neither party requests to have the jury polled, the verdict shall be entered upon the minutes of the court. C. C. P., art. 710. "The verdict in every criminal case must be general; when there are special pleas upon which the jury are to find, they must say in their verdict that the matters alleged in such pleas are true or untrue. Where the plea is not guilty, they must find that the defendant is either "guilty" or "not guilty," and in addition thereto they shall assess the punishment in all cases where the same is not absolutely fixed by law, to some particular penalty." C. C. P., art. 712. "When a prosecution is for an offense consisting of different degrees, the jury may find the defendant not guilty of the higher charge (naming it), but guilty of any degree inferior to that charged in the indictment or information." C. C. P., art. 713.

These are the general statutory rules with regard to verdicts in all criminal cases of whatsoever character. As seen, it is expressly declared that "the verdict in every criminal case must be general." What is meant by this? Simply that the verdict must find generally that defendant is "guilty" or "not guilty." Every verdict must ascertain and declare one or the other of these general issues—issues general, because involved in all criminal cases. Beyond this general feature of the verdict in each particular case the evidence may be said to be *quasi* special, to the extent that it declares the special plea of defendant (when interposed) "true" or "untrue," whenever it assesses a punishment. or in a prosecution for an offense consisting of different degrees, where it acquits of the higher, and find an inferior degree.

But with regard to these general verdicts, and as applicable indiscriminately to all criminal cases, except murder (as we propose hereafter to show), certain rules of construction to test their validity have been adopted and settled by the courts. As, for instance, that neither bad spelling nor ungrammatical findings of a jury will vitiate a verdict when the sense is clear." Koontz v. State, 41 Tex. 570; Haney v. State, 2 Tex. App. 504; Krebs v. State, 3 Tex. App. 349; Taylor v. State, 5 Tex. App. 569; McCoy v. State, 7 Tex. App. 379. Yet in these cases if the verdict is unintelligible it will not be permitted to stand. Ib. Other rules are, that in construing verdicts the object is to get at the meaning of the jury; that verdicts are to have a reasonable intendment and to have a reasonable construction. They are not to be avoided unless from necessity originating in doubt of their import or immateriality of the issue found or of their manifest tendency to work injustice. And it is moreover said that a verdict is sufficient when the jury have clearly expressed an intention to find the accused guilty of the crime charged in the indictment, and to assess his punishment within the terms of the law. And so a verdict is sufficient if the judgment rendered upon it can be plead in bar of another prosecution for the same offense. Lindsey v. State, 1 Tex. App. 327; Williams v. State, 5 Tex. App. 226; Chester v. State, 1 Tex. App. 703; Bland v. State, 4 Tex. App. 15; McMillan v. State, 7 Tex. App. 100; 1 Bish. Crim. Pro., sec. 1005. These rules are all well settled, and so far as they apply to criminal cases generally we will not pretend to controvert or deny them. As said above, however, every verdict in all criminal prosecutions must, to some extent, be a special finding. Suppose special pleas, for instance, have been interposed, and the jury, though finding the defendant guilty, have failed to find the special plea to be "true or untrue," would the verdict be sufficient? Could and would the court be authorized to infer and conclude that they in-

tended by finding him guilty, to find, and that the verdict could only be reasonably construed to mean, that they must have found the special plea was untrue, else they never could have found him guilty? By no means could such inference or intendment be indulged. Why? Because the statute is imperative that the verdict must say that the matters alleged in the plea are either "true" or "untrue." C. C. P., art. 712; Deaton v. State, 44 Tex. 446; Taylor v. State, 4 Tex. App. 40; Brown v. State, 7 Tex App. 619. Or, suppose the jury should fail to impose the fine or assess the penalty, where not absolutely fixed by law, would any court be authorized or warranted in holding the verdict sufficient and in supplying the deficiency and awarding a punishment commensurate with the finding? We are apprised of no such authority derivable from our law. On the other hand, such verdict would manifestly be insufficient under our laws to support a judgment imposing a fine or inflicting a punishment. Such a verdict would, in fact, be but a dead letter, a nullity to which nothing could give force or vitality.

So, then, it appears that with regard to misdemeanors and ordinary felonies, there are certain matters which the verdict must also specifically declare, and which, if not declared, can not be cured by intendment, inference of necessary deduction. And it will be seen that these matters which are incurable if not found, and incapable of explanation, if not certainly and explicitly found, are all those which by law are specifically and exclusively confided to the jury, and to them alone, and in so far as they are thus confided the verdict will be, and must be treated as special with reference to them.

Now let us see what differences, if any, exist in the rules above noted and those applicable to murder cases. At the very outset of the investigation we are met with the statute which declares that "if jury shall find any person guilty of murder they shall also find by their verdict whether it is of the first or second degree, and if any person shall plead guilty to an indictment for murder, a jury shall be summoned to find of what degree of murder he is guilty, and in either case they shall also find the punishment." P. C., art. 607. Language can not well be stronger or more imperative. "They shall also find by their verdict whether it (the murder) is of the first or second degree." In construing this statute the leading case decided by our Supreme Court is Buster v. State, 42 Tex. 315, wherein the verdict was: "We, the jury, find the defendant guilty as charged in the indictment, and assess his punishment to be hung by the neck until dead." Moore, J., delivering the opinion of the court, said: "It must clearly appear from the verdict not only that there is no conflict in the finding of the jury on the issue of the guilt and the assessment of the penalty, but their determination in the one must be in harmony with and supported by that in the other. To support the judgment the court must be able to see from the verdict of "guilty" returned by the jury that it authorizes and requires the assessment of a penalty affixed by law, or that the penalty assessed by the jury is warranted by law. And also that the jury are not mistaken in the character or degree of the offense of which they have, in fact, found the defendant guilty, and imposed a penalty not affixed to it by law. How can the court know this unless the verdict finds the offense, or its degree, as well as the penalty? It is but arguing in a circle to say the jury have found the defendant guilty of murder in the first degree because they have fixed the penalty of death; and that they were warranted in assessing the punishment of death because they found him guilty of murder in that degree. * * * * Unless the defendant is found guilty of murder in the first degree the court, as we have said, can not say they have assessed a penalty not warranted. To guard against the possibility of such a result, and to prevent the commutation by juries of the penalties fixed by law, had, no doubt, great force in inducing the legislature to require juries to find the degree of the offense in their verdicts, as well as assess the penalty in those cases in which this duty is confided to them. But whatever may have been the motive for its enactment, thus it is plainly written in the Code, and until altered and repealed, it is evidently the duty of the court to observe and enforce it. All the authorities in our State (except Holland v. State, 38 Tex. 474, which has been overruled), hold, as in Buster's Case, that in a murder trial the verdict of conviction must specify the degree. Clark's Crim. Law, 214. Note verdict.

In all the other States where the statute requires that the verdict shall find the degree in murder cases (with the exception of New York alone, perhaps), a similar construction has been adopted to that enunciated in Buster's case, as above quoted. Mr. Bishop says: "The view sustained by most of the authorities, and probably best in accord with the reason of the thing, is that the legislature meant by this provision to make sure of the jury's taking into their special consideration the distinguishing features of the degrees, and passing thereon. Hence, this provision is in the full sense mandatory, and unless they find the degree in a manner patent on the face of the verdict, without help from the particular terms of the indictment, it is void. No judgment can be rendered thereon, but a second trial must be ordered. Bish. Crim. Pro., Sec. 595, and note with authorities cited. Our conclusion from these authorities, is, that in murder cases the jury are absolutely required to find the degree, if they ascertain the accused to be guilty, and that in so far as finding the degree is concerned, the verdict is special in its nature as contradistinguished from the rules governing and controlling general verdicts. The characteristic distinction and difference between these two classes of verdicts may be concisely stated thus, viz: A general verdict is so called because the whole matter in issue is found generally; a special verdict is so called be-

cause some matter of fact is thereby found specially. 10 Bac. Abr., 308-9. The degree, that is the specific degree, is a matter of fact specially required in murder verdicts.

In State v. Belk, 76 N. C., 10, it is said: "It is familiar law that nothing can be added to a special verdict by inference. If it omits to set forth any fact essential to constitute the offence charged it is defective." In State v. Blue, 84 N. C., 807, it is said: "In finding a special verdict the facts should be stated fully and explicitly, and the omission of any fact necessary to constitute the offense is fatal. The practice is when the verdict is insufficient, insensible, or in violent antagonism to the evidence, to set it aside and grant a new trial." Citing 3 Whart, Cr. L., Sec. 3188; State v. Wallace, 3 Ired., 195; State v. Lowry, 74 N. C., 121. In State v. Custer, 65 N. C., 339, it is said: "In a special verdict we are not at liberty to infer anything not directly found." In State v. Curtis, 71 N. C., 56, it is said: "In Hawkins' Pleas of the Crown, vol. 2, p. 622, one of his twelve points said to be settled is as follows: 'That the court judging upon a special verdict is confined to the facts expressly found, and can not supply the want thereof, as to any material part thereof, by an argument or implication from what is expressly found.' * * * * In Hawkins' Pleas of the Crown, p. 622, note 2, it is said: 'If the verdict do not sufficiently ascertain the fact a *venire de novo* ought to issue,' and so are other authorities.'" S. C. 2 Crim. L. Repts.; Green, 748.

In Levison v. State, 54 Ala. 520, it is said: "It has been uniformly decided that under an indictment for murder, a judgment of conviction can not be rendered on a verdict of guilty which does not expressly find the degree of crime. 16 Ala. 781; 40 Ala. 698: 42 Ala. 509; 35 Ala. 52. In Johnson v. State, 17 Ala. 618, it was held the rule was not varied, because the indictment charged the murder was by poisoning. We do not doubt the correctness of these decisions; they are in conformity to the imperative terms of the statute, and no arguments drawn from the objects it is supposed the statute was intended to accomplish can justify a departure from them. Citing Whart. Hom., p. 187; People v. Caldwell, 40 Cal. 137. In Clay v. State, 43 Ala. 350, it was held "that a special verdict can not be aided by intendment or by reference to any extrinsic fact appearing in the record. In such a case the court should arrest the judgment on motion of the accused, and order a *venire facias de novo* to be awarded." The same court, in Weatherford v. State, says: "But why speculate about this matter? The wiser and safer course is to do just what the law requires, and to do it in the way the law requires. We have determined at this term in the case of Edgar v. State, a case very like this, that the jury must by their verdict determine both the character and the extent of the punishment." 43 Ala. 319. See also 42 Ala. 509.

When we apply these plain and well-settled rules to the verdict before us, what is the inevitable conclusion which forces itself upon us as to its insufficiency, measured by analogy with these standards of the law? Have the jury found the defendant guilty of murder in the first degree? To enable us to so hold, we must strike from the verdict a word which they have plainly spelled—a word in every day use in our language—and substitute in its place another and entirely different word, which we only infer they must have intended instead of the one they have used. Can we do this? If so, then we can take the same liberty with any word used. If courts can be allowed to indulge in such references and intendments in cases involving the life and liberty of the citizen, then why have the inestimable right of trial by jury at all? If the court can substitute a verdict which the jury have not found, or find one, when they have found none at all, then why have a jury? If the jury are required to declare the issues found in their verdict, then, unless the issues are found by them, the verdict is not theirs. There must be no doubt, to be supplied by mere intendment or inference when the life of a human being is dependent upon it. This court will not assume such responsibility whilst the law fixes the determination of the issue alone in the breasts and consciences of twelve jurymen of the country. We may be satisfied of defendant's guilt of murder in the first degree, and we may be satisfied the jury so intended to find, but until they have so expressly found, we can not give our sanction that human life shall be taken whilst there is any uncertainty with regard to it. The jury have not expressly found it in this case. Their verdict is not only uncertain, but unintelligible and senseless. Even *idem sonans* will not aid it. It finds defendant simply guilty without finding the degree, and such a verdict, by all the authorities, is held insufficient.

But it may be said the verdict ought to stand, because when the jury brought and returned it into court, it was evidently read "*first degree*" by the clerk, and assented to by the jury as thus read. It seems they have some such rule of receiving and construing and doctoring up written verdicts over in Louisiana; but the reason why they assume such authority in that State is stated in the case of State v. Ross, 32 La. Ann. 854. In that case it was held that the verdict of the jury is not illegal and null, because written "guilty without capitel parnish," when read aloud and distinctly announced by the clerk as "guilty without capital punishment." Besides, the law does not require even in cases of capital punishment that the jury should reduce their verdict to writing. Here, as we have seen, the verdict must be in writing, and the Louisiana rule can not be invoked.

In conclusion, we hold that the verdict in this case is a nullity—the jury have not found the degree of murder of which defendant was guilty. This the law requires they shall do. If defendant is to hang, let him hang according to law!

Passing upon a defective verdict of similar character the supreme court of California, in the People v. Ah Gow, says: "It is difficult to find any justification or excuse for the entry of such a verdict. The court may in any case instruct the jury as to the form of their verdict; and if it appears from their verdict as first returned that they do not know the proper form, it is the duty of the court to instruct them in that regard, and direct them to return the verdict in such form that the judgment of the law may thereupon be pronounced.

Mr. Bishop says: "It seems quite plain that in every case of a verdict rendered, the judge or prosecuting officer, or both, should look after its form, and its substance, so far as to prevent a doubtful or insufficient finding from passing into the records of the court to create embarrassment afterward, and perhaps the necessity of a new trial. The want of precaution in that matter has led to many adjudications for which the occasion ought never to have been furnished." 2 Bish. Cr. Pro., Sec. 831; 53 Cal., 627.

Because the verdict in this case is insufficient, and does not support the judgment rendered, the judgment is remanded for a new trial. Reversed and remanded.

WEEKLY DIGEST OF RECENT CASES.

1. ADMIRALTY—GARNISHMENT IN PERSONAM—FINAL DECREE.

When persons summoned as garnishees in a libel in admiralty *in personam* are adjudged by the court to have a fund of the principal defendant in their hands and to pay it into court, and the libelant afterwards obtains a final decree against him, with an award of execution against the fund in their hands, the first order is interlocutory, and they can appeal from the last decree only. A final decree of acquittal and restitution to the only claimant in a prize cause determines nothing as to the title in the property, beyond the question of prize or no prize; and another person, who actually conducts the defense in the prize cause in behalf and by consent of the claimant, without disclosing his own title under a previous bill of sale from the claimant, is not estopped to contest the claimant's title in a subsequent suit brought by creditors attaching the property or its proceeds as belonging to the claimant. *Cushing v. Laird; Foster v. Cushing*, U. S. S. C., March 5, 1883; 2 S. C. Rep., 196.

2. BANKRUPTCY—DEALING WITH FAILING DEBTOR.

A creditor dealing with a debtor whom he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or security without violating the bankrupt law. *Stucky v. Masonic Sav. Bank*, U. S. S. C., March 5, 1883; 2 S. C. Rep., 219.

3. CONSTITUTIONAL LAW—INTER-STATE COMMERCE—STATE LICENSE TO FERRIES.

A State can not regulate foreign commerce, but it may do many things which more or less affect it. It may tax the vehicles of commerce the same as other property owned by its citizens. When the State expressly grants an incorporated city the power to license, tax and regulate ferries, the latter may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different States, and the act by which this exaction is authorized will not be held to be a regulation of inter-State commerce. Where the burden imposed is not measured by the tonnage of the ferry-boats, nor by the number of times they cross the river or land at the city, it is not a duty of tonnage, nor is it in its essence contributive claim for the privilege of using a navigable river of the United States, or of arriving or departing from one of its ports, and is, therefore, not within the constitutional prohibition. The fact that a ferry-boat has been enrolled and licensed under the laws of the United States, at the custom-house, to carry on the coasting trade, does not authorize the owner to carry on the business of a ferry. The enrollment and licensing of a vessel under the laws of the United States, does not of itself exclude the right of a State to exact a license from her own citizens on account of their ownership. *Wiggins Ferry Co. v. City of East St. Louis*, U. S. S. C., March 5, 1883; 2 S. C. Rep. 257.

4. CONSTITUTIONAL LAW — MUNICIPAL CORPORATION—RETROACTIVE LAWS.

A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law; no more so than an appropriation act providing for the payment of a pre-existing claim. The constitutional inhibition does not apply to legislation recognizing or affirming the binding obligation of the State, or of any of its subordinate agencies, with respect to past transactions. *Read v. City of Plattsmouth*, U. S. S. C., March 5, 1883; 2 S. C. Rep., 208.

5. CONSTITUTIONAL LAW—NAVIGABLE RIVER—CITY ORDINANCE REGULATING DRAW BRIDGES.

The Chicago river and its branches are navigable waters of the United States, over which Congress, under its commercial power, may exercise control to the extent necessary to protect, preserve and improve their free navigation; but, until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary, and an ordinance passed by the city of Chicago, in the exercise of its police powers, under its charter granted by the State regulating the opening and closing of the draws on bridges within the limits of its jurisdiction during certain hours of the day, is not a violation of the commercial clause of the Constitution of the United States. *Escanaba, etc. Transp. Co. v. Chicago*, U. S. S. C., March 5, 1883; 2 S. C. Rep., 185.

6. CONTRACT—SALE—WARRANTY—ESTOPPEL.

The undisputed evidence shows that plaintiffs, when they offered the goods to defendants for sale, represented them to be "good bagging and

gunnies, * * * * far superior to any Chicago and Milwaukee packings, and worth 2 1-2c. per pound." *Held*, that this representation amounted to a warranty of the quality of the merchandise, upon which defendants had the right to rely. Where defendants, by letter, ordered a car load of plaintiffs' goods, and on such order plaintiffs sent two car-loads; *held*, that the warranty extended to all the goods they saw fit to furnish on the order. *Held*, that the testimany fully sustains the finding of the court below, that the merchandise was not of the value or quality represented by the plaintiffs, but was of inferior quality. *Held*, that a proposition by defendants for compromise and settlement, which is not accepted, operates neither as a ratification nor an estoppel. That they are not concluded by the amount they sent plaintiffs, which was tendered as in settlement of the matter, but was not so accepted, defendants are not estopped from claiming that the goods were not worth as much as they had remitted for them. *Winkler v. Patten*, S. C. Wis., April 4, 1883; 5 Wis. Leg. N., 201.

7. CONTRACT—VOLUNTARY PAYMENT—RECOVERY BACK.

The payments of tolls exacted by a canal company, whose right to the same is disputed, but which by the exercise of threats and other means of coercion compels the parties to accede to its demands or be put to considerable loss in their business, are such involuntary payments that the company will be compelled to make restitution upon suit for their recovery.—*Lehigh Coal & Nav. Co. v. Brown*, S. C. Pa. Oct. 2, 1882; 13 Pittsburg Leg J. 331.

8. CRIMINAL LAW—MURDER IN THE FIRST DEGREE.

There had been a quarrel between the prisoner and the deceased, in which violent language had been used by both, and the former had given the latter the lie; they then separated, and fifteen or twenty minutes afterwards, the deceased, carrying a light walking-stick, approached the prisoner, declaring that he would not stand what the prisoner had said; the prisoner picked up a large stick, and being asked by the deceased why he stood holding that stick, said: "if you come here, I will show you;" the deceased then raised his cane to parry a blow from the prisoner, and maybe struck at or struck the prisoner, who then struck the deceased two blows with the stick he held, from which he died about two hours afterwards. *Held*: not guilty of murder in the first degree. *McDaniel v. Commonwealth*, S. Ct. App. Va., March 15, 1883; 7 Va. L. J. 249.

9. EQUITY—FRAUDULENT CONVEYANCE—RE-CONVEYANCE.

Where one executes a conveyance for the purpose of hindering, delaying or defrauding creditors, a court of equity will not compel a re-conveyance in an action by the grantor against his grantee. The heir-at-law of the grantor is generally in no better position than his ancestor in reference to such property. *Lathrop v. Pollard*, S. C. Colorado, March 16, 1883; 1 Denv. L. J. 50.

10. FEDERAL PRACTICE—REDEMPTION OF MORTGAGED PROPERTY UNDER LOCAL LAWS.

The statutes of Illinois relating to the redemption of mortgaged property from sales under decree of the federal courts, examined. While the local law giving the right of redemption, first to the mortgagor, then to judgment creditors, is a rule of property obligatory upon the federal court, its is competent for the latter to prescribe the mode in which redemption from sale under its own decrees may be effected. The rule in the Circuit Court of the United States for the northern district of Illinois, requiring a judgment creditor to pay the redemption money to the clerk of that court, and not to the officer holding the execution sustained as being within the domain of practice and not affecting the substantial right to redeem within the time fixed by the local statute. The Illinois statute of 1879, entitling the purchaser, in case of redemption, to receive interest upon his bid at the rate of eight per cent. per annum, the previous law prescribing 10 per cent., is applicable to all decretal sales of mortgaged premises thereafter made, although the mortgage was given before the passage of that statute. Such reduction in the rate of interest did not impair the obligation of the contract between mortgagor and mortgagee, because the amendatory statute did not diminish the duty of the mortgagor to pay what he agreed to pay, or shorten the period of payment, or affect any remedy which the mortgagee had by existing law for the enforcement of his contract. The purchaser at decretal sale is entitled to interest at the rate prescribed by statute when he purchased. The amendatory statute operated, *proprio vigore*, to change the rule of court previously fixing the rate at 10 per cent. The existing laws, with reference to which the mortgagor and mortgagee must be assumed to have contracted, are those only which, in their direct or necessary legal operation, controlled or affected the obligations of their contract. *Connecticut Mut. L. Ins. Co. v. Cushman*, U. S. S. C., March 5, 1883; 2 S. C. Rep. 236.

11. FEDERAL SUPREME COURT—PRACTICE IN CASES FROM STATE COURT—FEDERAL QUESTION.

In cases brought up on error from the Supreme Court of Louisiana, the record may be referred to, if necessary, to determine whether the judgment is one we have authority to review; and where, on inspection of the record, it appears that the case was disposed of before the Federal question was reached, this court has no jurisdiction and the appeal will be dismissed on motion. *Crossley v. City of New Orleans*, U. S. S. C., March 12, 1883; 2 S. C. Rep. 300.

12. HOMESTEAD—DOUBLE HOUSE—MORTGAGE.

The premises consist of a lot in San Francisco, which, with the improvements, are of the value of $8,500. Upon the land is a double house, intended for two families, one part occupied by the insolvent, and the other part by his tenants. The house has two distinct entrances, and there is no interior connection by which a person can go from one house to the other. *Held*, that the portion not occupied by the insolvent could not be set apart as homestead property. 2. The existence of a mortgage on the above premises is not an element in the ascertainment of the property to be set apart as a homestead or its value. *Tiernan v. Creditors*, S. C. Cal., Dec., 1882; 3 Ohio L. J. 536.

13. MUNICIPAL CORPORATION—ERECTION OF SCHOOL BUILDING—VALIDATING ACT.

Although a city may be authorized by law to build school houses, and an act was passed authorizing it to issue bonds for the erection of a high school building, whatever implication of power as to school buildings may be admissible, if the law conferring municipal power stood alone, must give place to the express declarations, with the

accompanying qualifications, contained in the statute that deals by name with the particular subject. Where a municipal corporation, under a subsequent statute, issues bonds in excess of the amount authorized by a prior special statute, and receives the money of the plaintiff in error thereon, and applies the same to the purpose intended, of building a school house on property, the title to which is confirmed to it by the very statute now claimed by it to be unconstitutional, an obligation to restore the value thus received, kept and used, capable of judicial enforcement, immediately arises. *Read v. City of Plattsmouth*, U. S. S. C., March 5, 1883; 2 S. C. Rep. 208.

14. NATIONAL BANK — COLLUSIVE TRANSFER OF STOCK—LIABILITY OF STOCKHOLDER.

Where the holder of shares of stock in a national bank, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes with an irresponsible transferee, with the design of substituting the latter in his place, and thus leaving no one with any ability to respond for the individual liability imposed by the provisions of section 12 of the act of June, 3, 1864 (13 St. at Large, 102), and transfers his shares to such transferee, the transaction will be decreed to be a fraud on the creditors of the bank, and the transferrer will be held to the same liability to the creditors as before the transfer. Notwithstanding the answer on oath of the transferrer and the transferee to a bill in equity filed by the receiver of the bank to enforce such liability against the transferrer, calling for an answer on oath, the evidence in this case was *held* to be sufficient to outweigh the averments of the answer. The bill being one for discovery as well as relief, and the transfer being good between the parties, and only voidable at the election of the plaintiff, the case is one of equitable cognizance. A letter addressed to the receiver, and signed by the comptroller of the currency, directing the receiver to institute legal proceedings to enforce against every stockholder of the bank owning stock at the time the bank suspended, his or her personal liability, as such stockholder, under the statute, is sufficient evidence that the comptroller decided, before the suit was brought, that it was necessary to enforce the personal liability of the stockholders. The liability of the stockholders bears interest from the date of said letter. The decree of the circuit court, dismissing the bill, was entered after a new receiver had been appointed. An appeal to this court was taken in the name of the old receiver, as plaintiff, the new receiver becoming a surety in the appeal bond. In this court the new receiver moved to be substituted as plaintiff and appellant, without prejudice to the proceedings already had, and the appellees moved to dismiss the appeal on the ground that none was ever lawfully taken. The first motion was granted, and the second motion was denied. *Bowden v. Johnson*, U. S. S. C., March 5, 1883; 2 S. C. Rep., 246.

15. OPTION CONTRACTS—INTENTION OF PARTIES.

The validity of option contracts depends upon the mutual intention of the parties. If it is not the intention in making the contract, that any property shall be delivered or paid for, but that the fictitious sale shall be settled on differences, the contract is illegal. But if it is the *bona fide* intention of the seller to deliver, or the buyer to pay, and the option consists merely in the time of delivery within a given time, the contract is valid, and the putting up of margins to cover losses which may accrue from the fluctuations of prices, etc., is legitimate and proper. *Union National Bank v. Car*, U. S. C. C., D. Iowa; 29 Int. Rev. Record, 118.

16. PARTNERSHIP—REAL ESTATE—FIRM PROPERTY.

Real estate held in the name of a firm and bought with its funds, is not thereby converted into personalty; in order to effect such conversion as against strangers and creditors of the individual partners, it is necessary that the deed should expressly state that it is held as partnership property, or there must be actual notice to the party. *Kepler v. Erie Dime Sav. & Loan Co.*, S. C. Pa., Dec. 30, 1882; 13 W. N. C., 21.

17. PATENT—DREDGE-BOAT — WANT OF NOVELTY.

Letters patent granted to Edwin L. Brady, December 17, 1867, for an improved dredge-boat for excavating rivers, declared to be invalid for want of novelty and invention. The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. It was never their object to grant a monoply for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Although a patent is not set up by way of defense in an answer, yet if the invention patented thereby is afterwards put into actual use, the date of the patent will be evidence of the date of the invention on a question of priority between different parties. One person receiving from another a full and accurate description of a useful improvement, can not appropriate it to himself; and a patent obtained by him therefore will be void. *Atlantic Works v. Brady; Brady v. Atlantic Works*; U. S. S. C., March 5, 1883; 2 S. C. Rep. 225.

18. RAILROD MORTGAGE — FORECLOSURE — OPERATING EXPENSES.

When a court of chancery appoints a receiver of railroad property pending proceedings for foreclosure, it may impose such terms in reference to the payment from the income during the receivership of outstanding debts, for labor, supplies, equipment or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear reasonable; and the fund in court on foreclosure sale can not be diverted from the payment of such claims for labor and supplies. *Union Trust Co. v. Souther*, U. S. S. C., March 12, 1883; 2 S. C. Rep., 295.

19. TRUST — PURCHASE OF TRUST-ESTATE BY TRUSTEE.

A trustee can not become the owner of the trust estate, while such trustee, except where it is clear that the *cestui que trust* intended that the trustee should buy, and the transaction is beyond suspicion, and the burden is on the trustee to establish the latter fact. *Lathrop v. Pollard*, S. C. Colorado, March 16, 1883; 1 Denv. L. J. 50.